Supreme Court U.S.
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No. _____

In The
Supreme Court of the United States

DWIGHT D. YORK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the refusal of a trial court to sever disparate counts that are prejudicially intertwined in an indictment is an abridgement of the right to due process of law and a fair trial under the Fifth and Sixth Amendments?

II.

Whether permitting the government to proceed to trial on an indictment returned by a grand jury selected from a judicially recognized tainted jury pool renders the proceedings fundamentally unfair in violation of the Fifth and Sixth Amendments?

III.

Whether a defendant can be sentenced based upon facts not reflected in the jury verdict, in contravention of the right to a jury trial and due process of law under the Fifth and Sixth Amendments?

IV.

Whether use of a newer version of the Federal Sentencing Guidelines rather than that operative at the time of the purported crimes, resulting in more severe penalties, violates the *ex post facto* clause of the Constitution?

PARTIES TO THE PROCEEDINGS

All parties are contained in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dwight D. York, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case. He is appealing from the judgment rendered May 7, 2004 in the United States District Court for the Middle District of Georgia, Macon Division, in which he was sentenced to 1,620 months (135 years). Doc. 285. Judgment, May 7, 2004; Doc. 286, Restitution Order ($566,066.00), May 7, 2004. Following motions for new trial, he unsuccessfully appealed. Doc. 289, Notice of Appeal, May 7, 2004; *United States v. York*, 428 F.3d 1325 (2005), *re'hrg en banc denied*, 167 Fed.Appx. 169 (Table) (2005).

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. York*, 428 F.3d 1325 (2005), *re'hrg en banc denied*, 167 Fed.Appx. 169 (Table) (2005). App. 1, 25. The recusal order of the United States District Court, Middle District of Georgia, Macon Division, is reported at *United States v. York*, 274 F.Supp. 2d 1347 (M.D. Ga. 2003).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment affirming Petitioner's conviction and 135-year sentence on October 27, 2005. App. 1. A petition for rehearing was denied December 21, 2005. App. 25. The present petition is timely filed within the 60-day extension of time granted by Justice Thomas.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Five:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, article I, section 10, clause 1:

> No State shall . . . pass any . . . ex post facto Law.

Rule 8(a), Federal Rules of Criminal Procedure:

> The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Rule 14, Federal Rules of Criminal Procedure:

> (a) Relief. If the joinder of offenses . . . in an indictment, an information, or a consolidation for

trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

STATEMENT OF CASE

The 60-year old African-American Petitioner, leader of a religious organization, was sentenced to 135-year imprisonment. Doc. 285, Judgment, May 7, 2004. He was initially charged in the Middle District of Georgia with four counts of the interstate transportation of minors for unlawful sexual activity in violation of 18 U.S.C. § 2423(a), and entered pleas of not guilty. Doc. 1, Indictment, May 2, 2002; Doc. 5, Arraignment, May 9, 2002.

The parties agreed to a settlement that called for a stipulated term of 15-year imprisonment, and the forfeiture of property and currency. Doc. 78-86, Superseding Information (3 counts), Waiver of Indictment, Plea Agreement, Plea, Minute sheet on guilty plea, Findings of Fact on Guilty Plea, Preliminary Order of Forfeiture, Agreement Between Government and Defendant as to Waiver of Rights, Jan. 23, 2003. However, the judge rejected the agreement and stating that "a sentence of 20 years might be acceptable." *United States v. York*, 274 F.Supp. 2d 1347-48 (M.D. Ga. 2003); Doc. 107, Order, June 25, 2003. The judge was then removed from the case due to having become improperly involved in plea negotiations. *United States v. York*, 274 F.Supp. 2d at 1351.

A change of venue was granted due to extensive prejudicial publicity, transferring the case from the Macon Division, Middle District of Georgia, to the Brunswick

Division, Southern District of Georgia. Doc. 146, Order, Oct. 28, 2003. Nevertheless, the government obtained another indictment from the Macon jury pool that had been judicially determined to be polluted. Doc. 158, Superseding Indictment, Nov. 21, 2003. The charges against Petitioner were greatly expanded from three to fourteen counts, with the indictment growing from three to 48 pages. It intertwined alleged sexual misconduct with the unrelated failure to report financial transactions.[1] Pleas of not guilty were entered to all charges. Doc. 177, Pleas of not guilty, Dec. 16, 2003. Petitioner unsuccessfully sought dismissal of the disparate charges. Doc. 160-62, Motion To Dismiss Based Upon Outrageous Conduct, Motion To Dismiss Counts 1 and 2, Motion To Separate, Dec. 8, 2003. It was argued that under Fed. R. Crim. P. 8(a) and 14, his right to a fair trial was prejudicially compromised by the prosecution joining unrelated allegations of criminal conduct.[2]

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[1] The indictment charged a conspiracy under 18 U.S.C. § 1962(d) (Count One), racketeering violations under 18 U.S.C. § 1962(c) (Count Two), conspiracy to transport minors in interstate commerce for unlawful sexual activity and conspiracy to structure cash transactions to evade currency reporting requirements under 18 U.S.C. § 371 (Count Three), transporting minors in interstate commerce for the purposes of unlawful sexual activity under 18 U.S.C. §§ 3283, 2423(a) and 2 (Counts Four-Six and Eight), traveling in interstate commerce for the purpose of engaging in unlawful sexual acts with a minor under 18 U.S.C. §§ 3283 and 2423(b) (Count Seven), structuring transactions to evade reporting requirements under 31 U.S.C. §§ 5324(a)(3), 5313(a) and 18 U.S.C. § 2 (Counts Nine-Eleven), RICO forfeiture under 18 U.S.C. § 1963 (Count Twelve), and, criminal forfeiture in violation of exploitation of minors pursuant to 18 U.S.C. § 2253 (Count Thirteen). Doc. 158, *supra*.

[2] "[T]he predicate acts are clearly unrelated to the enterprise in that the purpose of an Indian tribe is not to bring minors across State lines for sexual purposes and least of all to structure cash bank

(Continued on following page)

Following a 14-day trial, the jury returned verdicts of guilty to all charges with the exception of Count Eight. Doc. 234-36, Jury Verdict, Minute Sheet, Jan. 23, 2004. Petitioner filed new trial and acquittal motions. Doc. 242-43, Motion for New Trial, Motion for Judgment of Acquittal, Jan. 30, 2004.

A Pre-sentence Investigation Report (PSI) was prepared, to which Petitioner objected. Doc.272, Objection To Pre-sentence Investigation Report, Apr. 12, 2004. The court denied the objections, and sentenced Petitioner to 1,620 months imprisonment.[3] Doc. 275, Transcript of sentencing, Apr. 22, 2004; Transcript of restitution hearing, Apr. 23, 2004; Doc. 285, Judgment, May 7, 2004. He was also ordered to pay $566,066.00. Doc. 286, Order, May 12, 2004.

A timely notice of appeal was filed. Doc. 289, Notice of Appeal, May 7, 2004. Thereafter, Petitioner filed a second motion for a new trial. It was based upon newly discovered evidence, that one of the government's witnesses had recanted her testimony and cast doubt onto the reliability of the testimony of several other witnesses. It was learned that

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deposits." Doc. 160 at 4. "The mere fact that Malachi Z. York allegedly transported or cause[d] to be transported minors across State lines, does not establish required relationship between the criminal acts and the affairs of the enterprise (Yamassee Tribe of Native Americans). *Id.* at 10-11. It was moved that the court "sever the child molestation charges from the lawful structuring charges and grant separate trials for each." Doc. 162 at 1.

[3] The 135-year sentence included the following consecutive terms: Count One, 240 months; Count Two, 240 months; Count Three, 60 months; Count Four, 180 months; Count Five, 180 months; Count Six, 180 months; Count Seven, 180 months; Count Nine, 120 months; Count Ten, 120 months; and Count Eleven, 120 months. *United States v. York*, 428 F.3d at 1329.

other prosecution witnesses were apparently encouraged to fabricate testimony against Petitioner. Doc. 294, Motion for New Trial, May 19, 2004. The motion was denied. Doc. 347, Order, Aug. 16, 2004.

REASONS FOR GRANTING THE WRIT

I. The Proceedings Involve A Question Of Exceptional Importance Because A Trial Court Must Sever Disparate Counts Where Their Joinder Would Prejudice The Accused In Contravention Of The Fifth And Sixth Amendments

The indictment misjoined sexual abuse charges with the unrelated financial structuring allegations. By intertwining such disparate charges, it would have been difficult for the jury not to find Petitioner guilty. The prejudicial atmosphere flowing from the sexual allegations certainly swept the jury into finding Petitioner liable for his alleged financial transgressions. Likewise, the financial charges made him appear dishonest and unworthy of the presumption of innocence as to the sexual contentions. Under circumstances, it is not surprising that guilty verdicts were returned with the judge imposing a 135-year sentence.

Petitioner was initially charged with the interstate transport of minors for unlawful sexual activity in violation of 18 U.S.C. § 2423(a) (Mann Act). Doc. 1, Indictment, May 2, 2002. As part of a settlement agreement, a three-page superseding information was returned re-alleging the Mann Act allegation, but adding failure to report deposits in 1999 and a forfeiture claim. Doc. 78, Superseding Information, Jan. 23, 2003; Doc. 80, Plea Agreement, Jan.

23, 2003. However, that dissolved due to the interference of the original trial judge who wanted a 20-year sentence rather than the 15-year term agreed upon by the parties. *United States v. York*, 274 F.Supp. 2d 1347-48.

Ten months later the government returned a 13-count, 48-page indictment against Petitioner. Doc. 158, Superseding Indictment, Nov. 21, 2003. It attempted to overcome the government's problem of charging Petitioner with stale Mann Act violations in which the statute of limitations had run, by creating a muddled aggregation of such claims, allegations of improperly structuring legal cash deposits, conspiracy charges, and racketeering claims based upon the belief that a recognized church ministry and Native American tribe constitutes an enterprise for illegal racketeering akin to a drug cartel or an organized crime syndicate. Thereafter Petitioner moved to separate Count Three (conspiracy to violate the Mann Act) and to sever the wholly unrelated financial reporting allegations. Contemporaneously, Petitioner also sought dismissal of the RICO claims, a subject of further district court error discussed below. Doc. 160-62, Motion To Dismiss Indictment, Motion To Dismiss Counts 1 and 2, Motion To Separate Count Three, Dec. 8, 2003.

The prosecution joined together *independent and unrelated* claims against Petitioner. First, it alleged that he sought to transport minors across state lines for the purpose of engaging in unlawful sexual activity sometime in the distant future, and secondly, that he engaged in the improper structuring of legal cash deposits to circumvent required administrative currency reporting regulations. The alleged acts were not only unrelated, but were also unrelated by time. Such a joinder offends due process under the Fifth Amendment and is contrary to the Federal

Rules of Criminal Procedure, Rule 8(a) permits "two or more offenses [to] be charged in the same indictment . . . in a separate count for each offense *if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.*" Fed. R. Crim. P. 8(a) (emphasis added); *see United States v. Weaver*, 905 F.2d 1466 (11th Cir. 1990).

The underlying principles of the constitutionally required indictment process are founded in the guarantee of due process. Disparate claims against a defendant, joined under the umbrella of one indictment, are susceptible to severance under Rules 8(a) and 14, most notably when the government's joinder of such claims are prejudicial. The rationale for the severance of dissimilar claims is fairness and due process.

This Court has held that reversal is mandated if "the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Lane,* 474 U.S. 438, 449 (1986) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). Misjoinder will "rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. at 446 n.8. Here, the prejudice to Petitioner could not have been more pervasive. *See United States v. Richardson*, 161 F.3d 728 (D.C.Cir. 1998) (threats charge was not properly joined with federal weapons charges).

It is recognized Rule 8(a) is not limited to crimes of the "same" character but also covers those of "similar" character. That means "nearly corresponding; resembling

in many respects; somewhat alike; having a general likeness." *United States v. Walser*, 3 F.3d 380, 385 (11th Cir. 1993). Moreover, when offenses are joined under Rule 8(a) by virtue of their "same or similar character," the offenses need only be similar in category, not in evidence. *See United States v. Coleman*, 22 F.3d 126, 133 (7th Cir. 1994).

The Eleventh Circuit was unreasonable in assuming that the Mann Act violations were similar in category, evidence, resemblance, or general likeness to alleged violations of currency reporting regulations. *United States v. York*, 428 F.3d at 1325. Such rationale belies logic for no definition can transform such unrelated allegations into similar ones. Thus, there is no question that the Mann Act violations were misjoined with the financial offenses.

Rule 14 directs that "[i]f the joinder of offenses . . . in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." The standard for applying the rule is that an appellate court is required to reverse a denial of a motion to sever if the joinder of disparate claims creates prejudicial error and results in actual prejudice that had "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Weaver*, 905 F.2d at 1477. There is no question but that the joinder of the unrelated charges in the case at hand served to prejudice Petitioner.

Not only did the joinder obfuscate statute of limitations issues relative to Mann Act claims, it clearly influenced the jury's verdict. The government sought to

eliminate the objectivity of the jury by submitting evidence of Petitioner's alleged wrongdoing regarding cash structuring in an effort to make him appear guilty of other unrelated crimes of child molestation. Likewise, the sexual allegations clearly made him seem guilty of the dissimilar financial charges.

Petitioner was a respected clergy member and a respected leader of a large "religious organization that consisted of approximately 5,000 members." Doc. 158, Superseding Indictment, Count One, *supra*. The prosecution sought to destroy that image by mischaracterizing him as a major criminal, corrupt racketeer, and opportunistic false minister. Through its joinder of dissimilar allegations, the government successfully influenced the jury with the claims that Petitioner was a child molester, a sinister tax cheat who wanted to hide the ministry's income, and a corrupt crime leader involved in racketeering and other corrupt practices. Thus, evidence of guilt concerning one act spilled over, leading the jury to conclude that he was guilty of the others.

The district court, pursuant to Rules 8(a) and 14, should have granted Petitioner's motion to sever the Mann Act counts from those related to claims of improper currency reporting. The legal standards for such separate acts are complex. At the very least, the jury instructions prejudiced and confused the jurors in addition to the actual prejudice accruing due to the jury recognition of many, multiple count allegations of guilt. Doc. 228, Charge to Jury, Jan. 22, 2004.

Petitioner was prejudiced by the joinder of objectively dissimilar charges of the indictment. The misjoinder of the dissimilar offenses in the single indictment resulted in a

deprivation of Petitioner's right under the Fifth Amendment to due process of law and a fair trial.

II. The Proceedings Involve A Question Of Exceptional Importance And The Court Of Appeals Decision Failed To Follow An Opinion Of This Court Because It Is Error For A Court To Allow A Trial To Proceed On An Indictment Returned By A Grand Jury Selected From A Judicially Recognized Tainted Jury Pool, Thereby Rendering The Proceedings Fundamentally Unfair Under The Fifth And Sixth Amendments

It was judicially determined that Petitioner could not obtain a fair and impartial trial in the Macon Division., and thus a change in venue was ordered:

> The Court GRANTS Defendant's Motion as to Fed. R. Crim. P. 21(a) because the Court is satisfied that without changing venue for the trial of this case, *Defendant cannot obtain a fair and impartial trial in the Macon Division of the Middle District of Georgia. . . .* In reaching the conclusion about where to try this case, the Court has carefully considered *the problem of media saturation and potential bias involving not only the allegations against Malakai (Malachi) Petitioner, but also reports about the Nuwaubians because York is the leader of the Nuwaubians.* The Court regularly reviews and has reviewed both the Macon Telegraph and the Atlanta Constitution for many years. Over the years *the Court has noticed in both newspapers coverage of Defendant's criminal case and articles that reflect unfavorably on the Nuwaubians that could adversely impact Defendant at trial. The Court has grave concerns about*

> *trying to select a jury in this case in any division in the Macon and Atlanta media markets. . .*

Doc. 146, Order, Oct. 28, 2003 (emphasis added).

Thus the case was moved to the Brunswick Division of the Southern District of Georgia. The prejudice was so strong that the prosecution did not object to the defense change-of-venue motion. Nevertheless, the government thereafter obtained a new indictment from a Grand Jury selected from the tainted jury pool within the Macon Division. Doc. 158, Superseding Indictment, Nov. 21, 2003.

In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Court discussed the standard for assessing non-constitutional errors in the grand jury. It was determined that the dismissal of an indictment is appropriate where it is established that the violation substantially influenced the grand jury's decision to indict or if there is a grave doubt that the decision to indict was free from the substantial influence of such violations. Earlier it was recognized that there is "no reason not to apply [Rule 52(a)] to "'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." *United States v. Mechanik*, 475 U.S. 66, 71-72 (1986). Dismissal of an indictment is appropriate "if it is established that the violation substantially influenced the grand jury's decision to indict," or where there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. *Id.* at 78; *see Kotteakos v. United States*, 328 U.S. at 758-59, 765; *United States v. Lane*, 474 U.S. at 454-55.

In denying relief, the Eleventh Circuit gave short shrift to the issue and seemed oblivious to *Bank of*

Nova Scotia v. United States, 487 U.S. 250. It determined that there had been a failure to establish that "publicity surrounding the case 'substantially influenced' the ultimate decision." *United States v. York*, 428 F.3d at 1332. The conclusion defied logic, since there had been a federal court finding a month earlier that Petitioner could not be fairly tried in the jurisdiction from which the grand jurors were drawn due to the enormous amount of prejudicial media and public attention the defendant had received. Doc. 146, *supra*.

It was constitutionally unacceptable for the prosecution to present Petitioner's a case to a grand jury selected from the tainted jury pool. The prejudice was a judicial fact; the government did not disagree. It would have been a simple matter for the prosecution to draw a grand jury from the Brunswick Division where the case had been moved. In fact, it defies logic that this was not done, and renders the prosecution's motive suspect.

Any jury, whether for trial or grand jury proceedings, selected from the Macon Division jury pool would be tainted having been equally affected by the same negative publicity. Thus, there is clearly a grave doubt that the grand jury decision to indict Petitioner on the Superseding Indictment was free from the concerns expressed by the court. The district court took "judicial notice" of the fact that any jury selected from this Macon Division would be tainted. Thus, denying Petitioner's Motion to Dismiss the Superseding Indictment and permitting the trial go forward was error. The facts that were uncontested by the government in the lower courts, are:

1. The jury pool in the Macon and Atlanta media markets was tainted;

2. The district court recognized that Petitioner could not have a fair trial in Macon Division;

3. The grand jury for the Superseding Indictment convened after the court had issued its order changing the venue to Brunswick Division due to the prejudicial atmosphere in Macon; and

4. The grand jury that returned the Superseding Indictment against Petitioner was selected from the judicially recognized tainted jury pool in the Macon Division.

The role of the grand jury must not be overlooked. Even though investigative in nature and thus given wide latitude, it must also ensure fair law enforcement. As explained by this Court:

> The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a "presentment or indictment of a Grand Jury." *Cf. Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded prosecutions. *Branzburg v. Hayes*, 408

U.S. 665, 686-87, 92 S.Ct. 2646, 2658-2659, 33 L.Ed.2d 626 (1972).

United States v. Calandra, 414 U.S. 338, 342-43 (1974).

The constitutional character of the grand jury must be more than to act as a rubber stamp for government prosecution. It has an obligation to act fairly without bias or outside influence. This Court is asked to examine that role and establish the principle that defendants such as petitioner, are entitled to have a grand jury drawn from a jury pool that is not tainted. To hold otherwise would contravene the very essence of the Fifth and Sixth Amendments.

III. The Proceedings Involve A Question Of Exceptional Importance And The Court Of Appeals Decision Failed To Follow An Opinion Of This Court, In That Petitioner Was Sentenced To 135 Years Imprisonment Based Upon Facts Not Reflected In The Jury Verdict, In Contravention Of The Right To Due Process Of Law And A Jury Trial Under The Fifth And Sixth Amendments

The decision below is in conflict with this Court's determination in *United States v. Booker*, 543 U.S. 220 (2005). Petitioner was sentenced to 1,620 months (135 years) imprisonment. Doc. 275, Transcript of sentencing, Apr. 22, 2004; Transcript of restitution hearing, Apr. 23, 2004; Doc. 285, Judgment, May 7, 2004. The Eleventh Circuit recognized that "the district court committed

Booker[4] error by sentencing Petitioner under a mandatory Guidelines scheme." *United States v. York*, 428 F.3d at 1336. Nevertheless, the sentence was affirmed. The court made the incredible conclusion that Petitioner "failed to establish that either error affected his substantial rights." *Id.*

The Fifth and Sixth Amendments guarantee the right to a trial by jury wherein no punishment can be imposed unless a defendant is found guilty of particular criminal charge beyond a reasonable doubt. At odds with that fundamental constitutional right is the Sentencing Reform Act of 1984. It sets up a system that requires a district court to sentence or punish a defendant based upon conduct that is not admitted or proved beyond a reasonable doubt. *See* Title II of The Comprehensive Crime Control Act of 1984; USSG (United States Sentencing Commission, Guidelines Manual), Chapter 1, Part A, intro., comment (3).

In addition to a base sentencing range established by reference to the jury verdict alone, the Guidelines prescribe enhanced sentencing ranges based upon sentencing factors that are determined by a judge after trial, by a preponderance of the evidence. *Id.* at comment (2) and (4)(a). Due process requires that every fact necessary to constitute a crime must be found beyond a reasonable doubt by a jury if that right is not waived. *Harris v. United States*, 536 U.S. 545, 575-76 (2002) (Thomas, J., dissenting), citing *In re Winship*, 397 U.S. 358, 364 (1970). Society

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[4] In *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005), the defendant's sentence was vacated because the sentencing enhancements violated the Sixth Amendment right to jury trial after *Blakely v. Washington*, 542 U.S. 296 (2004).

has long recognized a necessary link between punishment and crime. *Id.* at 574-76, citing *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime"). "Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?" *Harris* at 576.

The Guidelines do precisely what is prohibited under the Sixth Amendment and require district courts to punish, as here, a defendant based upon conduct that is not admitted or proved beyond a reasonable doubt. For example, USSG § 1B1.3, gives an expansive interpretation of "Relevant Conduct." Under it, ordinary *crimes* such as perjury, subornation of perjury, escape, and obstruction of justice arguably become "relevant conduct" or "sentencing factors." Such semantics are enough to exempt such criminal conduct from the provisions of the Fifth and Sixth Amendments even though citizens can be sent to prison for years simply by the government proving with "reliable information" (not trial quality evidence) to a judge (not a jury) that it is more probably true than not true (not "beyond a reasonable doubt") that the defendant committed such "relevant conduct" (not crime).

However, the Sentencing Guidelines cannot supersede the Constitution and should not be used to accomplish an "end-run" around the fundamental right to trial by a jury and to usurp the role of the jury. The district court should not be permitted to use the Guidelines to ignore a verdict, take the jury's role, find culpability for conduct beyond what is reflected in the jury verdict, and punish based

upon that extra-jury determination at a standard lower than proof beyond a reasonable doubt. *See Anderson v. Fuller*, 455 U.S. 1028, 1032 (1982) (Burger, C. J., dissenting) (noting that federal courts should not usurp the function of a jury in finding facts).

This Court has begun to recognize the fundamental defects in the manner the justice system determines sentences for defendants in a series of decisions. In *Apprendi v. New Jersey*, 530 U.S. at 490, it was held that "other than the fact of a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Ring v. Arizona*, 536 U.S. 584 (2002), this imperative was clarified and reaffirmed, noting that the rule in *Apprendi* applies to any aggravating fact necessary to expose a defendant to punishment beyond an otherwise mandatory statutory limit.

After *Apprendi*, courts assumed the term "statutory maximum" referred to in *Apprendi* and *Ring* was the maximum sentence set forth under the statute listed in the indictment. There was an assumption that the "statutory maximum" does not apply to the various sentencing thresholds established under the federal sentencing guidelines. The courts have been wrong. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment." *Blakely v. Washington*, 542 U.S. at 302 (emphasis in original).

The *Blakely* decision not only clarifies what was meant by the term "statutory maximum," but as a result of that amplification calls into question the constitutionality of current sentencing practices in federal courts. This Court noted that the rule announced in *Apprendi* reflected two longstanding tenets of common-law criminal jurisprudence: "that the truth of every accusation against the defendant should afterwards be confirmed by a unanimous [jury verdict], and that an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law and it is no accusation in reason." (citations omitted) *Blakely*, at 301-302. The principle that "'every fact which is legally essential to the punishment' must be charged in the indictment and proved to a jury." *Id.* at 341 n.5.

In the days following *Blakely*, several courts, including the Seventh and Ninth Circuits have applied *Blakely* to the Federal Sentencing Guidelines.[5] *See United States v. Booker*, 375 F.3d 508 (vacating defendant's sentence because sentencing enhancements violated the Sixth Amendment right to jury trial after *Blakely*); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004) (same); *United States v. King*, 328 F.Supp. 2d 1276 (M.D. Fla. 2004); *United States v. Landgarten*, 325 F.Supp. 2d 234

[5] The Eleventh Circuit has said that the holding in *Blakely* does not alter the application of the Federal Sentencing Guidelines. *United States v. Reese*, 382 F.3d 1308 (11th Cir. 2004). However, the court recognized that the decision was likely to be overturned by this Court, stating, "in light of this instability [of the decision], we recognize that district courts might deem it wise and appropriate to take protective steps in case the Guidelines are later found unconstitutional in whole or in part." *Id.* at 1312.

(E.D.N.Y. 2004) (court orders that in light of *Blakely*, sentencing must be held in front of a jury); *United States v. Medas*, 232 F.Supp. 2d 436 (E.D.N.Y. 2004) (holding the application of the Guidelines is unconstitutional after *Blakely*); *United States v. Croxford*, 2004 W.L. 1462111 (C.D. Utah 2004); *United States v. Lamoreaux*, 2004 W.L. 1557283 (D. Mo. 2004); *United States v. Leach*, 325 F.Supp. 2d 557(E.D. Pa. 2004); *United States v. Green*, 346 F.Supp. 2d 259 (D. Mass. 2004).

Compliance with the Sixth Amendment requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" must be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The statutory maximum is not the maximum penalty provided by statute of conviction. Instead, this Court has held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* at 302. The jury verdict alone – or the defendant's admission alone – "must authorize the sentence." *Id.* Therefore, the upper bound of the appropriate Guideline range, based on facts proven to a jury beyond a reasonable doubt or admitted by Petitioner, establishes the relevant statutory maximum for *Apprendi* purposes.

Under the Federal Sentencing Guidelines, dollar amounts, drug amounts, other enhancements, and upward departures all have the same effect – namely, they all *increase* the maximum permissible sentence under the guidelines. A judge's reliance on such factors at sentencing is therefore unconstitutional. *United States v. Booker*, 375 F.3d 508; *United States v. Ameline*, 376 F.3d 967; *United States v. King*, 328 F.Supp. 2d 1276.

Blakely changes the way the Guidelines must be applied. Once the applicable offense guideline is selected based on the offense of conviction (*see* USSG §§ 1B1.1(a) and 1B1.2), the base offense level and any adjustments to it must now be determined on the basis of facts found by a jury to have been proved beyond a reasonable doubt. *See United States v. Booker*, 375 F.3d 508; *United States v. Ameline*, 376 F.3d 967.

This Court recently clarified once more the law and put the issue to rest:

> Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must *be admitted by the defendant or proved to a jury beyond a reasonable doubt*.

United States v. Booker, 543 U.S. at 244 (emphasis added).

In the instant case, the government had Petitioner's sentence increased based on enhancements that were never submitted to the jury. This was error. The sentence should have been determined exclusively by the base offense level corresponding to the offense reflected in the jury verdict. Any increase in that sentence based on factors never submitted to the jury is in violation of his Sixth Amendment right to a jury trial and must be vacated.

IV. The Court Of Appeals Decision Failed To Follow An Opinion Of This Court, And The Proceedings Involve A Question Of Exceptional Importance, Because The Use Of The Newer 2002 Version Of The Federal Sentencing Guidelines Instead Of The 1993 Guidelines Violates The *Ex Post Facto* Clause

The 2002 Federal Sentencing Guidelines followed to sentence Petitioner were more severe than that in effect at the time he allegedly committed the instant offenses. Nevertheless, the district court used the newer guideline to calculate the base offense level in sentencing Petitioner. The 1993 version should have been used. The alleged offenses listed for groups II, III, IV, V, and VI all occurred no later than 1993. According to the government, this is when the intent to transport the minors across state lines allegedly formed, and when the crimes occurred.

The *ex post facto* clause forbids the imposition of punishment more severe, as here, than that in existence when the criminal act to be punished occurred. U.S. Const., art. I, § 10, cl. 1. This Court addressed the issue a quarter of a century ago:

> The *ex post facto* prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). *See Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325, 25 S.Ct. 264, 265-266, 49 L.Ed. 494 (1905); *In re Medley*, 134 U.S. 160, 171, 10 S.Ct.

384, 387, 33 L.Ed. 835 (1890); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

Weaver v. Graham, 450 U.S. 24, 28 (1981).

What occurred in the situation at hand meets the criteria for relief. "[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29; *see Lindsey v. Washington*, 301 U.S. at 401. Those elements are present here.

The *ex post facto* clause demands that where Congressional revision of the Federal Sentencing Guidelines "changes the legal consequences of acts completed before its effective date" to the detriment of the convict, the Guidelines in effect at the time of the criminal act must be applied. *Miller v. Florida*, 482 U.S. 423, 431 (1987). Therefore, the guidelines in effect at the time of sentencing apply.

Here the probation office correctly cited that § 2G1.1 applies to the offense of transporting individuals, including minors, for the purpose of prohibited sexual conduct. However, despite the fact that the offense conduct occurred in 1993, the court used the 2002 version of the Federal Sentencing Guidelines to determine the Petitioner's base offense level. Doc. 275, Minute Sheet, Apr. 22, 2004; Doc. 285, Judgment, *supra*. Under the 2002 version, § 2G1.1(c)(2) instructs that if the offense involved criminal sexual abuse, then § 2A3.1 should be used to determine the offense level. When applying § 2A3.1, the offense level becomes 27. Further, additional enhancements are applicable under § 2A3.1 based on the age of the victims and whether the victims were under his care or supervision. As

a result of the enhancements, Petitioner's offense levels for the offenses listed in groups II, III, IV, V, and VI were increased drastically. Importantly, the 1993 version of the Guidelines do not contain a cross reference to § 2A3.1. Instead, USSG § 2G1.1 (1993) provides for a base offense level of 14 and no other enhancements apply under this section.

Applying the 1993 Guidelines, Petitioner's offense levels should have been drastically lower than the offense levels listed in the PSI. As it was, he was sentenced to 135 years of imprisonment.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: May 20, 2006

Respectfully submitted,

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428 F.3d 1325

United States Court of Appeals, Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee, v.
Dwight D. YORK, a.k.a. Malakai Z. York, etc., Defendant-Appellant. No. 04-12354.

Oct. 27, 2005.

Jeffrey M. Brandt, Matthew McGavock Robinson, Robinson & Brandt, P.S.C., Cincinnati, OH, Adrian Lopez Patrick, Law Offices of Adrian L. Patrick, Athens, GA, Benjamin A. Davis, Jr., Davis Law Firm, Atlanta, GA, for Defendant-Appellant.

Richard S. Moultrie, Jr., Macon, GA, Dean S. Daskal, Columbus, GA, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before BIRCH, HULL and BOWMAN*, Circuit Judges.

PER CURIAM:

Defendant-Appellant Dwight D. York appeals his convictions and 1,620-month sentence. After review and oral argument, we affirm.

I. BACKGROUND

Dwight D. York ("York") is the leader of the United Nation of Nuwaubian Moors, a religious ministry/Native American tribe that has existed in some form since the

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* The Honorable Pasco M. Bowman, II, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

1960s.[1] Over the years, the Nuwaubian organization's official philosophy (as well as its name) has changed several times, alternatively finding its basis in Islamic, Hebrew, ancient Egyptian, Yamasee Indian, and various other cultures and religions. The organization was founded in Brooklyn, New York; however, in approximately 1990 the Nuwaubians moved to a farm in Sullivan County, New York. In early 1993, York began to move the Nuwaubians from Sullivan County to a large plot of land in Eatonton, Georgia.

On November 21, 2003, a grand jury in the United States District Court for the Middle District of Georgia (Macon Division) returned a second superseding indictment (the "Indictment"),[2] which formed the basis for York's fourteen-day trial in January 2004. The Indictment contains thirteen counts.

Specifically, Count One charges York with a Racketeer Influenced and Corrupt Organizations ("RICO") conspiracy, in violation of 18 U.S.C. § 1962(d). Count Two charges a substantive RICO offense, in violation of 18 U.S.C. § 1962(c). The RICO counts are predicated on specific instances in which York: (1) engaged in the interstate

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[1] York is known by several names, including "Malakai Z. York," "Malachi York," "Isa Muhammad," "Isa Alihad Mahdi," and "Baba." For the sake of consistency, we refer to him as "York."

[2] Initially, York and an alleged co-conspirator were indicted on four counts arising out of their alleged interstate transport of minors for unlawful sexual activity. The original indictment was first superseded in order to facilitate a guilty plea by York to one count of interstate transport of a minor for unlawful sexual activity; however, York's plea agreement was rejected by the district court. York subsequently withdrew his guilty plea, and the Indictment (on which York was ultimately tried) was returned by the grand jury on November 21, 2003.

transport of minors with the intent to engage in unlawful sexual activity; (2) engaged in interstate travel for the purpose of engaging in unlawful sexual activity with minors; and (3) unlawfully structured cash transactions in order to avoid federal reporting requirements. Count Three charges York with general criminal conspiracy to engage in the interstate transport of minors with the intent to engage in unlawful sexual activity, as well as with conspiracy to unlawfully structure cash transactions to avoid federal reporting requirements, in violation of 18 U.S.C. § 371.

Counts Four, Five, Six, and Eight charge York with the specific interstate-transport-of-minors-for-sex acts that form the basis for those predicate acts in the RICO and conspiracy counts, in violation of the Mann Act, 18 U.S.C. § 2423(a). Specifically, Count Four charges the interstate transport of a minor, identified as "I.J.," from Sullivan County, New York to Eatonton, Georgia in February 1993. Count Five charges the interstate transport of three minors, identified as "K.H.," "A.N.," and "D.N.," from Sullivan County to Eatonton in April 1993. Count Six charges the interstate transport of a minor, identified as "A.T.," from Kings County, New York to Georgia in April 1993. Count Eight charges the interstate transport of three minors, identified as "A.N.," "K.L.," and "S.W.," from Georgia to Florida in 1996.

Count Seven charges York with a 1996 act of interstate travel from Georgia to Florida for the purpose of engaging in unlawful sexual activity with minors, in violation of the Mann Act, 18 U.S.C. § 2423(b). The minors in Count Seven are the same minors named in Count Eight.

Counts Nine, Ten, and Eleven charge York with the acts of unlawfully structuring cash transactions that form the basis for those predicate acts in the RICO and conspiracy counts of the Indictment. Specifically, Counts Nine, Ten, and Eleven charge York with three acts of unlawfully structuring cash transactions to avoid federal reporting requirements, in violation of 31 U.S.C. § 5313(a) and 31 U.S.C. § 5324(a)(3). Count Nine charges York with unlawfully structuring cash transactions on or about September 29-30, 1999. Count Ten charges York with unlawfully structuring cash transactions on or about October 6-8, 1999. Count Eleven charges York with unlawfully structuring cash transactions on or about April 5-11, 2000. Finally, Counts Twelve and Thirteen are forfeiture counts.

At trial, there was substantial evidence that under York's leadership, the Nuwaubians' lifestyle was highly restricted.[3] York had many "wives" who served his business and personal needs. York's followers were expected to abide by his rules or risk punishment or expulsion from the Nuwaubian organization. Men and women did not live together; children beyond toddler age were generally separated from their parents; and children were separated by sex and age and lived in different buildings and rooms accordingly. Children were home-schooled and usually interacted with their biological parents for only specific, short periods of time.

Several witnesses testified that York, both in Sullivan County, New York and in Eatonton, Georgia, as well as in

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[3] We discuss the evidence in the light most favorable to the government and recognize that York vigorously denies the government's version of events. *See United States v. Garcia*, 405 F.3d 1260, 1269 (11th Cir.2005).

Athens, Georgia, engaged in a regular course of sexual contact with underage children within the Nuwaubian organization, including oral, vaginal, and anal sex. Some of the children were as young as six years old when the initial sexual contact with York occurred. Certain of York's "wives" and older sexual partners (some still underage themselves) helped recruit or encourage younger children to participate in sex acts with York.

Additionally, there was substantial evidence that York owned and operated a number of stores and outlets throughout the country that sold religious and non-religious Nuwaubian items. A "finance office" in Eatonton, Georgia, staffed by various Nuwaubians, was responsible for collecting and handling the profits from York's businesses. In addition to the sex crime evidence at trial, witnesses testified that York instructed the workers in the "finance office" never to deposit $10,000 or more in cash into any of his bank accounts at any given time, in order to evade federal cash transaction reporting requirements.

The jury convicted York on eleven of the thirteen counts in the Indictment, acquitting York on Counts Eight and Twelve. The district court sentenced York to the statutory maximum prison term on each count of conviction, to be served consecutively, yielding a total sentence of 1,620 months' incarceration. York timely appealed.

II. ISSUES ON APPEAL

On appeal, York raises several assignments of error, including: (1) the Indictment misjoined the sexual abuse charges with the financial-structuring charges, and the district court erred in refusing to sever those charges; (2) the district court erred in refusing to dismiss the RICO

counts because the United Nation of Nuwaubian Moors is not an "enterprise" under RICO and because there is an insufficient connection between York's alleged acts and the Nuwaubian organization; (3) the district court erred in refusing to dismiss the Indictment because the Indictment was improperly returned by a grand jury tainted by pre-trial publicity; (4) the district court erred in allowing the government to call a certain witness in rebuttal, and further erred by refusing to allow York to call his own rebuttal witness thereafter; (5) there was insufficient evidence to convict York of the charges that he transported minors in interstate commerce with the intent that the minors would engage in unlawful sexual activity, and further, the government did not put forth sufficient evidence to prove that any underlying sexual activity undertaken by York was actually unlawful; (6) the district court erred in denying York's motion to dismiss two counts of the Indictment because the minor victim was undisputedly over the age of consent at the time the sexual act took place;[4] (7) the district court erred in denying York a continuance when York switched lead counsel approximately two weeks before trial; (8) York's sentence violates the Sixth Amendment under *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), because the district court enhanced his sentence based on facts not reflected in the jury's verdict; (9) York's sentence is invalid under *Booker* because he was sentenced under a mandatory, rather than advisory, guidelines scheme; and (10) York's sentence violates the *ex post facto* clause of the

[4] This victim, however, was undisputedly *under* the age of consent at the time she was transported in interstate commerce from Sullivan County, New York to Eatonton, Georgia.

Constitution because York was sentenced under the November 2000 edition of the United States Sentencing Guidelines ("Guidelines") rather than under the November 1993 edition of the Guidelines.[5]

III. DISCUSSION

After careful review of the voluminous record in this case, as well as the arguments of the parties in both their briefs and at oral argument, we conclude that all of York's claims of error lack merit.[6] Only York's pre-trial publicity and severance claims, along with York's three assignments of sentencing error, warrant further discussion.

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[5] York also asserts that his post-trial counsel was ineffective in that, without York's express consent, he withdrew a motion for judgment of acquittal and a motion for new trial, both of which were initially filed by York's trial counsel. We conclude that York's ineffective assistance of counsel claim is not properly before us at this time because the record below is not sufficiently developed to adequately address the merits of York's argument. *See United States v. Camacho,* 40 F.3d 349, 355 (11th Cir.1994), *overruled in part on other grounds by United States v. Sanchez,* 269 F.3d 1250 (11th Cir.2001); *see also Massaro v. United States,* 538 U.S. 500, 504-05, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003) (holding that "in most cases" it is preferable that a motion for ineffective assistance of counsel be raised on collateral review rather than on direct appeal). As such, we do not reach this claim.

[6] The decision to permit rebuttal testimony lies in the sound discretion of the trial court. *United States v. Gold,* 743 F.2d 800, 818 (11th Cir.1984). A district court's denial of a motion for mistrial is also reviewed for abuse of discretion, as is the denial of a motion for continuance. *United States v. Chastain,* 198 F.3d 1338, 1352 (11th Cir.1999); *United States v. Wright,* 63 F.3d 1067, 1071 (11th Cir.1995); *United States v. Verderame,* 51 F.3d 249, 251 (11th Cir.1995). We review a defendant's challenge to the sufficiency of the evidence *de novo,* taking all reasonable inferences in the government's favor. *United States v. Rudisill,* 187 F.3d 1260, 1267 (11th Cir.1999).

A. Pre-Trial Publicity

In late October 2003, the district court granted York's motion to change venue and ordered that the location of York's trial be moved from the United States District Court for the Middle District of Georgia (Macon Division) to the United States District Court for the Southern District of Georgia (Brunswick Division). In its change-of-venue order, the district court "first note[d] that the Government has not objected to Defendant's motion." The district court then stated that it had "grave concerns about trying to select a jury in this case in any division in the Macon and Atlanta media markets" and concluded that York could not receive "a fair and impartial trial" if the trial were to take place in Macon.[7]

Approximately one month *after* the change-of-venue order, the grand jury issued the second superseding indictment (the Indictment), on which York was ultimately tried. The grand jury was chosen from the same pool of individuals from which any trial jury would have been chosen if York's trial had actually taken place within the Middle District of Georgia (Macon Division).

After the Indictment issued in November 2003, York moved for its dismissal, arguing that if the trial jury pool was tainted by pre-trial publicity as of October 2003, then it must follow that the Indictment – issued by a Macon-area grand jury approximately one month after the change-of-venue order – must also be tainted due to pre-indictment

[7] York's appeal, however, properly comes to this Court from the United States District Court for the Middle District of Georgia (Macon Division), where the Nuwaubians' Eatonton, Georgia compound is located and the Indictment was returned.

publicity. The district court denied York's motion, concluding that York "failed to show that the pre-indictment publicity resulted in actual bias or prejudice against him" before the grand jury. The district court found that the existence of pre-trial publicity by itself, or even evidence that the grand jury may have been aware of the publicity, was insufficient to carry York's burden of showing actual bias or prejudice in the grand jurors' decision to indict. The district court concluded that the grand jury need not deliberate in a "'sterile chamber'" and that pre-trial publicity alone was an inadequate ground upon which to base the dismissal of the Indictment.

With regard to its change-of-venue order, the district court drew a distinction between the role of the grand jury and a trial jury, pointing out that the grand jury is an investigative and accusatorial body "'unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.'" The district court then classified its earlier decision to permit a change of venue as one taken out of "an abundance of caution" and found that dismissal of the Indictment was "far too extreme a remedy under these circumstances."

The district court's refusal to dismiss the Indictment based on pre-trial publicity was not error, much less reversible error.[8] First, our decision in *United States v. Waldon*, 363 F.3d 1103, 1109-10 (11th Cir.2004), is controlling. In that case, as here, the defendant Waldon argued

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[8] We review the district court's denial of a motion to dismiss an indictment for abuse of discretion, although the legal sufficiency of the allegations in an indictment is a question of law that is reviewed *de novo*. *United States v. Waldon*, 363 F.3d 1103, 1108 (11th Cir.2004); *United States v. Pendergraft*, 297 F.3d 1198, 1204 (11th Cir.2002).

that pre-trial publicity prejudiced the grand jury such that dismissal of his second superseding indictment was required. Moreover, just as in this case, the *Waldon* Court recognized that "case was undoubtedly the subject of much press in the Jacksonville area." *Waldon,* 363 F.3d at 1109. Nevertheless, this Court squarely held in *Waldon* that "publicity is generally not a basis for dismissal of an indictment." *Id.* In *Waldon,* we pointed out that the defendant's pre-trial publicity argument misconstrued "the role of the grand jury, which is an 'investigative and accusatorial [body] unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.'" *Id.* (quoting *United States v. Calandra,* 414 U.S. 338, 349, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974)). We concluded that the *Waldon* district court did not err in failing to dismiss the indictment on the grounds of pre-trial publicity because "the concern over adverse publicity is its effect on the fairness of the ensuing *trial,* and not its effect on the grand jury."[9] *Id.* at 1109-10.

Although *Waldon* governs here, York nevertheless argues that his situation is distinguishable from, and not controlled by, *Waldon* because in his case, the district court issued a change-of-venue order on the specific ground of excess pre-trial publicity and expressly noted its "grave concerns" about picking a trial jury from the Macon area. In other words, York argues that *Waldon* does not bind the panel in this case because here, it was "'judicially recognized'" that the jury pool in Macon was unduly influenced by pre-trial publicity.

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[9] Moreover, in *Waldon,* we noted that "it does not appear that any indictment has thus far been dismissed on the ground that it was induced by pretrial publicity," and York cites no such case. *Waldon,* 363 F.3d at 1109 (quotation marks, citations, and alterations omitted).

We reject York's argument because the amount of the pre-trial publicity in *Waldon* was not the basis for the *Waldon* decision; indeed, in *Waldon,* we expressly assumed a high level of pre-trial publicity. *See id.* at 1109. Rather, our decision in *Waldon* was based on the entirely different functions of the grand jury *vis-a-vis* the trial jury and the different types of evidentiary restrictions before each body. The point in *Waldon* was, and the point remains today, that the grand jury is not impeded by the evidentiary and procedural restrictions applicable to trial juries. *Id.* A grand jury investigation "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Calandra,* 414 U.S. at 344, 94 S.Ct. at 618. Moreover, "[t]he grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered." *Id.* at 344-45, 94 S.Ct. at 618. As a result, the district court's conclusion that a change-of-trial-venue from the Macon area was warranted does not necessarily mean, as York argues, that the district court erred in refusing to dismiss the Indictment issued by a grand jury from the Macon area.

We do recognize that *Waldon* states that publicity is "*generally* not a basis for dismissal of an indictment." *Waldon,* 363 F.3d at 1109 (emphasis added). We further acknowledge that York maintains that *Calandra* requires dismissal of his Indictment because the Supreme Court recognized in *Calandra* that the grand jury is not merely an investigative body but also an institution that exists for "the protection of citizens against unfounded criminal prosecutions." *Calandra,* 414 U.S. at 343, 94 S.Ct. at 617. However, York fails to explain how his prosecution was rendered "unfounded" by the publicity that surrounded the

Indictment. This is particularly true given *Calandra*'s specific recognition that an indictment's validity is not affected by the type of evidence considered by a grand jury. *Id.* at 344-45, 94 S.Ct. at 618-19.

More importantly, and in any event, York has failed to establish that publicity surrounding his case "substantially influenced" the ultimate decision to indict him and thereby caused him actual prejudice. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 256, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228 (1988) (dismissal of indictment due to error in grand jury proceedings is only appropriate where "'it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations") (citation omitted). Indeed, York overstates the significance of the district court's change-of-venue order, given that York's venue motion was unopposed and the district court later described its decision to grant the venue motion as a decision taken out of "an abundance of caution." For all of these reasons, and based on the record and factual circumstances of this case, we reject York's argument that the district court erred in denying his motion to dismiss the Indictment due to pre-trial publicity.

B. Severance

York alternatively asserts that the Indictment misjoined the sexual abuse charges with the unlawful financial structuring charges, and that the district court abused its discretion in denying his motion to sever those

charges.[10] In response, the government emphasizes that these charges are not totally unrelated and that there was evidence at trial that York staffed his "finance office" with only women and preferred that the positions of greatest responsibility within the "finance office" be staffed only by women with whom York had previously had a sexual relationship.

In order to show that the district court wrongly denied his motion to sever, York must show that he suffered "actual prejudice" from any misjoinder that allegedly may have occurred. *See United States v. Hersh,* 297 F.3d 1233, 1242-43 & n. 14 (11th Cir.2002) (regardless of whether or not charges were initially misjoined, in order to show that the district court abused its discretion in denying a motion to sever, the defendant must demonstrate that he suffered "actual prejudice" or "compelling prejudice" from the misjoinder that caused "'substantial and injurious effect or influence in determining the jury's verdict'") (citation omitted).

Here, we readily conclude that York has failed to show that he suffered "actual prejudice" from the alleged misjoinder of the charges and the denial of his severance motion. *Id.* at 1243 (finding no actual prejudice where child pornography charges were allegedly misjoined with charges of child molestation, and holding that "'more than some prejudice must be shown; the appellant must demonstrate that he received an unfair trial and suffered compelling

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[10] This Court reviews *de novo* whether the government's initial joinder of criminal charges was proper under Federal Rule of Criminal Procedure 8. We then review the district court's subsequent denial of a motion to sever for abuse of discretion. *United States v. Hersh,* 297 F.3d 1233, 1241 (11th Cir.2002).

prejudice'" via more than "'conclusory allegations'") (citation omitted). Although York conclusorily asserts that the alleged misjoinder "unfairly circumvented" the statute of limitations for many of the alleged sex acts, York also acknowledges that the RICO charge rendered any statute of limitations argument moot, stating in his reply brief that "[h]ad it not been for the umbrella of RICO, these acts would not have been prosecutable." *See also United States v. Welch,* 656 F.2d 1039, 1051 & n. 20 (5th Cir. Unit A Sept.1981) (substantive RICO and RICO conspiracy charges "can provide an overall connection that will allow the joinder of seemingly unrelated acts");[11] *United States v. Starrett,* 55 F.3d 1525, 1544-45 (11th Cir.1995) (five-year statute of limitations for substantive RICO charge only requires that at least one predicate act be committed within five years of the date defendant was charged in the indictment).

Moreover, the jury was expressly instructed that it was to consider each count of the Indictment separately and was further instructed that merely finding York guilty of one charged offense was not to influence its verdict as to the other charged offenses. In *Hersh,* we found a similar limiting instruction significant in affirming a district court's denial of a motion to sever. *Hersh,* 297 F.3d at 1244 ("'If the possible prejudice may be cured by a cautionary instruction severance is not required.'") (citation omitted). Further, the jury acquitted York on two of the thirteen counts, evincing that it considered each count separately.

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[11] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this Court adopted as binding precedent all Fifth Circuit decisions rendered prior to October 1, 1981.

For all of the foregoing reasons, the district court did not abuse its discretion in denying York's motion to sever.

C. Sentencing

We first outline the manner in which York's sentence was calculated and then review his sentencing claims.

1. Pre-Sentence Investigation Report and Sentencing Hearing

Prior to York's sentencing, a probation officer prepared a Pre-Sentence Investigation report ("PSI") utilizing the November 2000 edition of the Guidelines.[12] The PSI recommended a base offense level of twenty-seven, under U.S.S.G. §§ 2G1.1(c)(2), 2A3.1, and 3D1.1 (2000).[13] The PSI also recommended: (1) a four-level increase under U.S.S.G. § 2A3.1(b)(2)(A) because the victim in each relevant group was under age twelve when he or she was first molested by York; (2) a two-level increase under U.S.S.G. § 2A3.1(b)(3)(A) because the victims were under York's care and supervisory control; (3) a four-level increase

[12] Although York argues in his briefs that he was improperly sentenced under the November 2002 edition of the Guidelines, it is clear from the PSI and the transcript of the sentencing hearing that York was in fact sentenced under the November 2000 edition of the Guidelines. *See* PSI ¶ 69; Tr. of Apr. 22, 2004 Sentencing Hr'g at 3. Accordingly, we will construe York's *ex post facto* claim as a claim that York was improperly sentenced under the November 2000 edition of the Guidelines (hereinafter, the "2000" edition of the Guidelines).

[13] Specifically, the PSI grouped relevant counts together pursuant to U.S.S.G. § 3D1.1 and used the groups that produced the highest total offense levels (those groups dealing with the interstate transport of minors for sexual activity) to compute York's base offense level at twenty-seven.

under U.S.S.G. § 3B1.1(a) because York exercised a leadership role and/or the Nuwaubian enterprise involved more than five participants and was otherwise extensive; and (4) a two-level increase under U.S.S.G. § 3B1.4 because York utilized a person under the age of eighteen to commit the offense. These increases resulted in an adjusted offense level of thirty-nine. The PSI then applied a multiple-count adjustment of four levels, pursuant to U.S.S.G. § 3D1.4, for a combined adjusted offense level of forty-three. York's criminal history category of I and adjusted offense level of forty-three yielded a Guidelines range of life imprisonment.

York filed several written objections to the PSI. York's objections asserted that the 1993 edition of the Guidelines – rather than the 2000 edition – should have been used to calculate his sentence, and that the use of the 2000 edition of the Guidelines violated the *ex post facto* clause of the Constitution. York did not, however, raise any *Booker* objections in the district court.

At York's sentencing hearing, the district court adopted the findings in the PSI and rejected York's *ex post facto* argument. Given that York's Guidelines range was life imprisonment on each count, the district court then sentenced York to the statutory maximum for each count of conviction, with the sentence on each count to run consecutively. Specifically, the district court sentenced York to 240 months' imprisonment on Count One; 240 months' imprisonment on Count Two; 60 months' imprisonment on Count Three; 180 months' imprisonment on Count Four; 180 months' imprisonment on Count Five; 180 months' imprisonment on Count Six; 180 months' imprisonment on Count Seven; 120 months' imprisonment on Count Nine; 120 months' imprisonment on Count Ten; and

120 months' imprisonment on Count Eleven, for a total sentence of 1,620 months' imprisonment.

At sentencing, the district court expressly stated that it found York's sentence "appropriate" in light of "the nature of the crimes, the victims involved, the length of the offense, and the totality of the circumstances." At no point during sentencing did the district court indicate that it desired to impose a lesser sentence than that called for by the Guidelines, or that it felt that the Guidelines range was overly harsh.

2. Booker Error

On appeal, York does not contend that there is insufficient evidence to support the district court's findings of fact as to his specific sentencing enhancements, or that the district court legally misapplied or miscalculated those sentencing enhancements. York simply contends that his sentence violates *Booker* because the district court imposed extra-verdict sentencing enhancements under a *mandatory* Guidelines scheme.

This Court recently recognized that there are two types of *Booker* error, constitutional and statutory. *United States v. Mathenia,* 409 F.3d 1289, 1291-92 (11th Cir.2005). "The constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge; the error is in the mandatory nature of the guidelines once the guidelines range has been determined." *United States v. Rodriguez,* 398 F.3d 1291, 1301 (11th Cir.), *cert. denied,* ___U.S. ___, 125 S.Ct. 2935, 162 L.Ed.2d 866 (2005). Meanwhile, "statutory error occurs when the district court sentences a defendant 'under a mandatory guidelines scheme, even in the absence of a

Sixth Amendment enhancement violation.'" *Mathenia*, 409 F.3d at 1291 (citation omitted). York argues that the district court committed both constitutional and statutory *Booker* error.

Because York did not raise his *Booker* claims before the district court, we review those claims only for plain error. *Rodriguez*, 398 F.3d at 1298. In order to establish plain error, York must show "'(1) error, (2) that is plain, and (3) that affects substantial rights.'" *Id.* (citation omitted). "'If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (citation omitted).

Turning first to York's claim of constitutional *Booker* error, there is a substantial question as to whether the facts supporting the enhancements in York's sentence were extra-verdict or well within the facts necessarily determined by the jury's verdict (i.e., whether the first prong of the plain-error test is present). The Indictment alleges that York: (1) was the leader of a 5,000-person religious organization (the enterprise in the RICO count); (2) directed his followers, particularly the children, to view him as a god-like or father figure; (3) molested multiple minors, including several who were under age twelve at the time the specific acts charged in the Indictment took place; and (4) ordered minors to bring other minors to him for unlawful sexual activity. The jury convicted York of each count of the Indictment that alleges such conduct, arguably establishing most, if not all, facts necessary to support each enhancement imposed by the district court.

In any event, the district court did commit statutory *Booker* error by sentencing York under a mandatory Guidelines scheme. *See United States v. Shelton*, 400 F.3d 1325, 1330-31 (11th Cir.2005). Moreover, in order to satisfy the second prong of the plain-error test, *Booker* error need only be plain at the time of our appellate consideration. *See Rodriguez*, 398 F.3d at 1299. Although York has thus clearly shown statutory *Booker* error, and even assuming *arguendo* that he has also shown constitutional *Booker* error, we still affirm York's sentence because he has failed to establish that either error affected his substantial rights. "A defendant's substantial rights are affected when there is a reasonable probability that the district court would have imposed a different sentence if the guidelines were not mandatory." *United States v. Rivas-Ruiz*, No. 04-13056, 2005 WL 2334375, at 2 & n. 1, 151 Fed.Appx. 831, 833 & n. 1 (11th Cir. Sept.26, 2005) (unpublished) (concluding that the defendant failed to meet his burden of showing that his substantial rights were affected by *Booker* error because the record did not indicate what the district court would have done if the Guidelines were not mandatory); *see also Rodriguez*, 398 F.3d at 1299-1301 (concluding that where the effect of *Booker* constitutional error "on the result in the district court is uncertain or indeterminate . . . the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error").

Nothing in the transcript of York's sentencing hearing or elsewhere in the record establishes a "reasonable probability" that if the district court had sentenced York under an advisory Guidelines scheme rather than a mandatory Guidelines scheme, the district court would have imposed a lesser sentence. *See Rodriguez*, 398 F.3d at

1301; *see also United States v. Fields*, 408 F.3d 1356, 1360 (11th Cir.2005) ("Where '[w]e just don't know' whether the defendant would have received a lesser sentence if the guidelines had been advisory, the defendant has not met his burden of showing prejudice.") (citation omitted). If anything, the record shows that the district court would not have imposed a lesser sentence because the district court specifically determined that the Guidelines range and York's 1,620 month sentence were "appropriate" in light of the "nature of the crimes, the victims involved, the length of the offense, and the totality of the circumstances." *Compare Rodriguez*, 398 F.3d at 1301 (third prong of plain-error test not met because record provides no reason to believe that district judge might have shortened defendant's sentence) *with Shelton*, 400 F.3d at 1332 (third prong of plain-error test met where district court "during sentencing expressed several times its view that the sentence required by the Guidelines was too severe"; classified defendant's criminal history category as "'unfortunate[]'"; sentenced defendant to low end of Guidelines range; and classified final sentence as "'more than appropriate'"). Accordingly, York's *Booker* claims fail because he has not met his burden with regard to the third prong of the plain-error test.

3. Ex Post Facto Claim

Finally, we address York's argument that the district court improperly imposed sentencing enhancements based on U.S.S.G. § 2G1.1's ("Section 2G1.1") cross-reference to U.S.S.G. § 2A3.1 ("Section 2A3.1") in the 2000 edition of the Guidelines. York contends that the district court should have used the 1993 edition of the Guidelines, because his sex crimes should have been severed from his

financial crimes and his last sex crime concluded in 1993. York argues that the 1993 edition of the Guidelines contains no cross-reference to Section 2A3.1 and thus the district court's use of the 2000 edition of the Guidelines resulted in a more onerous sentence and violated the *ex post facto* clause of the Constitution.[14]

"Generally, a convicted defendant's sentence is based on the United States Sentencing Commission Guidelines Manual 'in effect on the date the defendant is sentenced.'" *United States v. Bailey*, 123 F.3d 1381, 1403 (11th Cir.1997) (quoting 18 U.S.C. § 3553(a)(4)). However, if the Manual in effect on the date of sentencing violates the *ex post facto* clause of the Constitution, then the district court must use the Manual that was in effect on the date that the crime was committed. *Id.* A sentencing scheme violates the *ex post facto* clause "if it is enacted after the crime was committed and before sentencing, and its application results in a more onerous penalty." *Id.* at 1403 n. 32. Further, if related crimes are committed in a series, the date of the crime at the end of the series governs the date of the Manual to be used.[15] *Id.* at 1404-05.

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[14] A defendant's claim that his sentence was imposed in violation of the *ex post facto* clause of the Constitution is a question of law that this Court reviews *de novo*. *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir.2000).

[15] "The use of either the Sentencing Guidelines Manual in effect at sentencing or the one in effect when the crime was committed is known as the 'one book rule.'" *Bailey*, 123 F.3d at 1403 (explaining in detail that under the one book rule, only one edition of the Manual is to be applied in sentencing a defendant). York was sentenced in 2004, but no party contends that the 2004 Manual should have been used. The 2000 Manual was used instead, and York's only argument on appeal is that the district court should have used the 1993 Manual. Thus we address only whether the 1993 Manual should have been used.

We reject York's argument that his sentence violates the *ex post facto* clause for two reasons. First, as outlined above, the district court did not err in refusing to sever the sex charges from the financial charges. Thus, the district court properly refused to apply the 1993 edition of the Guidelines at York's sentencing because York's crimes continued well past 1993. *See Bailey,* 123 F.3d at 1404-05 ("[R]elated offenses committed in a series will be sentenced together under the . . . Manual in effect at the end of the series.").

Secondly, and in any event, there is no *ex post facto* violation present here because both the 1993 and 2000 editions of the Guidelines contain applicable cross-references to Section 2A3.1. Under the 2000 edition of the Guidelines, Section 2G1.1 is the applicable guideline for convictions under 18 U.S.C. § 2423(a), which prohibits the interstate transport of a minor with the intent to engage in criminal sexual activity. Section 2G1.1 is entitled "Promoting . . . Prohibited Sexual Conduct" and states as follows: "If the [18 U.S.C. § 2423(a)] offense involved criminal sex abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, *apply § 2A3.1.*" U.S.S.G. § 2G1.1(c)(2) (2000) (emphasis added).

Meanwhile, under the 1993 edition of the Guidelines, U.S.S.G. § 2G1.2 ("Section 2G1.2") is the applicable guideline for convictions under 18 U.S.C. § 2423(a). Just as Section 2G1.1 (2000) does, Section 2G1.2 (1993), entitled "Transportation of a Minor for the Purpose of . . . Prohibited Sexual Conduct," provides that "[i]f the [18 U.S.C. § 2423(a)] offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, *apply § 2A3.1.*" U.S.S.G. § 2G1.2(c)(2) (1993) (emphasis added).

In other words, contrary to York's argument, under *both* Section 2G1.1 (2000) and Section 2G1.2 (1993), there *are* applicable cross-references to Section 2A3.1 if the interstate transport offense involves criminal sexual abuse. *Compare* U.S.S.G. § 2G1.1(c)(2) (2000) *with* U.S.S.G. § 2G1.2(c)(2) (1993). While the numbering of the sub-sections (Section 2G1.1 and 2G1.2) is different, the substance of the two provisions is the same for 18 U.S.C. § 2423(a) offenses.[16]

In his reply brief, York essentially concedes that point, but he also argues (1) that the only way to arrive at the same offense level that the district court reached here is "by manipulating the [1993 edition of the] Guidelines," and (2) that "his sentence would have been lower" under the 1993 edition of the Guidelines. However, York cites no case or record evidence in support of his argument that his sentence would have been lower if it had been calculated under the 1993 edition of the Guidelines, and as discussed, our own review of the record does not reflect any indication that the district court wished to impose a different sentence. More to the point, because the cross-reference to Section 2A3.1 is essentially identical in both the 1993 and 2000 editions of the Guidelines, the district court did not violate the *ex post facto* clause by using the 2000 edition.

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[16] There is no Section 2G1.2 in the 2000 edition of the Guidelines. However, in the 2000 edition of the Guidelines, Section 2G1.1 is unquestionably the applicable guideline for convictions under 18 U.S.C. § 2423(a). *See* U.S.S.G. app. A (2000); *see also* U.S.S.G. § 2G1.2 historical note (2000) ("Section 2G1.2 . . . was deleted by consolidation with [Section] 2G1.1 effective November 1, 1996.").

IV. CONCLUSION

For all of the above reasons, we affirm York's convictions and sentence.

AFFIRMED.

167 Fed.Appx. 169

United States Court of Appeals, Eleventh Circuit.
U.S.
v.
Dwight D. York, a/k/a Malakai Z. York, a/k/a Isa Muhammad, a/k/a Isa Alihad Mahdi, a/k/a Baba
NO. 04-12354

December 21, 2005

DENIALS OF REHEARING EN BANC.